

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs January 25, 2006

STATE OF TENNESSEE v. ARLIE THOMAS

Direct appeal from the Criminal Court for Putnam County
No. 02-0786 Lillie Ann Sells, Judge

No. M2004-01538-CCA-R3-CD - Filed May 22, 2006

The Defendant, Arlie Thomas, was convicted of first degree premeditated murder and sentenced to life in prison. On appeal, the Defendant asserts that: (1) the evidence was insufficient to establish premeditation; (2) the trial court improperly overruled the Defendant's motion to suppress two pieces of evidence; (3) the trial court erred when it denied the Defendant's motion for a continuance and change of venue based on pre-trial publicity; (4) the trial court erred when it admitted into evidence a photograph of the victim prior to her death and a photograph of the barrel that contained the victim's body; (5) the trial court erred when it denied his request for a new trial based upon comments made by the State during closing arguments; (6) the trial court erred when it refused to allow the Defendant to move into evidence a statement from the bill of particulars; and (7) the trial court erred when it refused the Defendant's request for a mistrial based upon certain members of the jury pool discussing the case prior to voir dire. Finding that there exists no reversible error, we affirm the judgment of the trial court.

Tenn. R. App. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which JERRY L. SMITH and THOMAS T. WOODALL, JJ., joined.

H. Marshall Judd, Cookeville, Tennessee (on appeal) and Ricky Jenkins, Sparta, Tennessee (at trial) for the appellant, Arlie Thomas.

Paul G. Summers, Attorney General and Reporter; Preston Shipp, Assistant Attorney General; William E. Gibson, District Attorney General; and David A. Patterson, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

I. Facts

This case arises from the Defendant's conviction for first degree murder. At the Defendant's trial, the following evidence was presented: Special Agent Bob Krofssik, of the Tennessee Bureau

of Investigation ("T.B.I."), testified that, on January 22, 2000, he was contacted by the Putnam County Sheriff's Department to assist in an investigation. He said that on the following day he executed a search warrant for an older model mobile home on 6009 Burgess Falls Road, where the Defendant lived. Specifically, the warrant allowed him to interview the Defendant and search for the body of Mary Thomas, the Defendant's wife, as well as any evidence that would reveal how she died. Agent Krofssik explained that, while interviewing the Defendant, the Defendant mentioned that he had Mary Thomas's wedding and engagement ring in a brown bag in his pocket. According to Agent Krofssik, the Defendant told him that when the Defendant returned home from work on Friday, January 21, 2000, the rings were on the counter in his home. The Agent testified that the Defendant told him that the victim was in the process of moving out of their home, but the day before her disappearance they had a conversation and she agreed to stay. The Defendant then told Agent Krofssik that, on the evening prior to the victim's disappearance, they went to a party at the Defendant's cousin's house. The Defendant then stated that he went to work the next morning, and when he returned home the rings were on the counter, the victim was gone, and he has not seen her since.

Agent Krofssik stated that, on September 12, 2002, he went back to the Defendant's property to execute another search warrant and an arrest warrant for the Defendant. He then testified that the Defendant was arrested and brought back to the Sheriff's Department, where the Defendant gave the following written statement:

Mary and I had agreed on how we were going to try and str[a]ighten out our li[v]es. [W]e [b]oth agreed we loved one another and were happy.

On [T]hursday morning we went to the liquor store[,] bought whiskey[.] [W]hen we got back we found out the law had been there[.] [W]e called the law. Linda Dilldine came out [and] talked to me and Mary. Everything was [oaky].

That night we went to the Norton[']s[.] I didn't drink but maybe [one] [b]eer. Mary and everyone else drank whiskey. Later that [n]ight when we went home she got violent, cursing me[,] threw her rings down[,] then she grab[b]ed a knife and s[w]ung at me [two] or [three] times[.]

I s[w]ung at her with my fis[t] trying to stop her[.] She jerked her head [b]ack and I hit her throat[.] I didn't mean to hit her there[,] [b]ut I did. I tried what I could to save her[,] [b]ut no use.

I s[a]t there all night[,] g[o]t a barrel and put her in it[.] Later[,] Friday morning[,] Ross [c]ame over to get me to go to work[.] I went to work and then to the [N]orton[']s be[fore] going home. [I] didn't say [any]thing to any[one] about Mary.

Roger c[a]me [b]y Saturday[.] I asked for help. [The] Law came Sunday[.] I didn't know what to do so I [l]ied.

I hid the barrel behi[]nd the trail[e]r[.] [The] Law didn't find it[.]

I still [have] it.

Agent Krofssik testified that thirty-one months passed between the date of his initial questioning of the Defendant and the date of the signed confession. Agent Krofssik said that a barrel with a body, later identified as the victim, was subsequently found on the Defendant's property.

On cross-examination, Agent Krofssik testified that he had taken statements from many people with information pertinent to his investigation and that he had written these statements out himself and had each declarant read and then sign their statement. When questioned about a statement made by Robert Williams, Agent Krofssik could not recall if Williams was illiterate or had requested permission for his wife to be present while giving his statement.

Agent Krofssik agreed that, from the time of the Defendant's confession, the Defendant was cooperative, non-threatening, and seemed genuinely concerned about the victim's body. He further testified that, although he was present on the Defendant's property when the barrel containing the victim's body was discovered and that he was present in the Medical Examiner's Office when the barrel was opened, he merely followed the vehicle containing the barrel to the Medical Examiner's Office and never witnessed the contents of the barrel at the Defendant's property. Agent Krofssik testified that he was not aware of any identifying marks or numbers that were put on the barrel before it was taken to the Medical Examiner's Office, however, he was insistent that the barrel from the Defendant's property was the same barrel opened at the Medical Examiner's Office.

On re-direct examination, Agent Krofssik testified that blood was found underneath a rug that had been stapled down to the floor in the Defendant's trailer. According to the agent's testimony, there was a layer of mud over the blood, and the Defendant told him the blood was dog's blood. On re-cross examination, Agent Krofssik agreed that no test had shown that the blood in the Defendant's home was human blood and that even if it were human blood, that would be consistent with the Defendant's tape recorded confession stating that some blood came from the victim's mouth.

Tommy Manier testified that he had know the victim since 1995, and she had moved in with him in January of 1996. He said that she stayed with him for several months and that they had a romantic relationship. He stated that the two had remained close until her disappearance and described himself as "a good close friend" of the victim. Manier said that in the weeks prior to the victim's death he had been sending friends over to check on her and agreed that this was done because he had concerns for her. He stated that two days prior to the victim's disappearance she had come over to his house and brought her clothes and a few other items and left them. Manier testified that about two weeks prior to the victim's death the Defendant came to his home looking for the victim and told Manier to tell the victim that she had one hour to get home or he would take "another course of action," and she would know what the Defendant was talking about.

On cross examination, Manier stated that when the victim moved out of his home in the late summer or early fall of 1996, she moved in with the Defendant. He said that he maintained sporadic contact with the victim from 1997 through 1999, but he did not have sexual relations with her. He stated that the victim moved in with him for a second time in January of 2000, but the relationship remained plutonic. Manier testified that he stopped on the Defendant's property to talk with the victim from time to time, however, he said that he only did so because he often had to drive down their street and would see the victim in the front yard. He again denied that he was having any sexual relations with the victim before her death.

Vickie Holliman testified that she was "[b]est of friends," with the victim. One evening, about one week prior to the victim's disappearance, Holliman and the victim had gone to Walmart. Upon returning from Walmart, Holliman helped the victim bring some items into the trailer where she lived with the Defendant. Holliman said that, when they entered the trailer, the Defendant was "waiving" a gun and told Holliman that if he found out that Holliman had been taking the victim to see Manier he was "going to kill every[]one of [them]." Holliman said that the Defendant had made similar statements two or three times in the weeks leading up to the victim's death and that the Defendant referred to the victim as "bitch [and] whore." The day that the victim was killed, Holliman and the victim drove past the Defendant on the road, but did not stop. Later that day the victim requested Holliman take her to the Defendant's residence. Holliman told her she did not want to take the victim to the Defendant's because she was "afraid something might happen" to her. Holliman took the victim to the Defendant's anyway, and the victim and Defendant got into an argument. During this argument, the Defendant was calling the victim names and "jerked her by the arm."

On cross-examination, Holliman stated that she did not believe that there was any kind of romantic relationship between Manier and the victim in the time leading up to the victim's death.

Roger Fisher testified that two days after the victim was murdered, January 22, 2000, the Defendant called Fisher to his home and told Fisher that he and the victim had been in an argument, and he had let things go too far and had hid her in a barrel. The Defendant asked Fisher for help in disposing the of the body and asked if Fisher could get a boat so that they could take the victim to Cane Hollow, a remote area with no developments. Inside the Defendant's trailer there was an area stained with blood with a smear of mud over it. The Defendant told Fisher that it was dog's blood. There was no rug covering the stained area. The Defendant also told Fisher that he did not like Manier. Two or three hours later, Fisher reported the conversation to the police. Fisher said that he was not offered anything in exchange for his testimony and did not feel threatened or have words put in his mouth by the detective who interviewed him. The day following Fisher's statement to the police, he was recalled to the Sheriff's Department and asked to confront the Defendant, which he stated was not easy to do. He said "tell them where she is," and the Defendant responded by saying "[w]hy are you doing this to me?"

On cross-examination, Fisher testified that he could not remember seeing a rug in the Defendant's house, but he conceded that he may have previously stated that there was a throw rug

somewhere in the house. Fisher had drank seven or eight beers by the time he got down to the Sheriff's Department to make his statement on January 22, and when asked if he was intoxicated, he replied "[b]y law standard[s], yes." Fisher would not agree with the suggestion that the number of beers he drank that day had an effect on his memory of the events. Fisher could not testify as to what happened between the Defendant and the victim the day of the murder because the Defendant never explained exactly what transpired. Fisher said that he was never told he could be facing charges as an accessory to murder and was offered no help with a recent DUI arrest in exchange for his testimony. Fisher also stated that he does not own a boat. On re-direct examination, Fisher stated that he has several family members who own boats and that he could borrow those boats at anytime.

Anthony Thomas, the Defendant's son and the victim's stepson, testified that he was interviewed by Agent Krofssik while in jail, and he received no special arrangement in exchange for his testimony. Thomas came forward with information pertinent to the case by his own volition because he was coming off of methamphetamine and wanted to begin moving on with his life by putting the incident in question behind him. Around a week after the victim was murdered, the Defendant showed up at Thomas's house. This was the first time that the Defendant had ever been to Thomas's house. The Defendant told Thomas that the Defendant and the victim were drunk and got into a fight. The victim told the Defendant that she was leaving him, and the Defendant said that she was not going to leave him. The victim said "by God, I'll leave," and she pulled a knife. The Defendant attempted to defend himself and hit the victim in the throat. The victim fell to the floor where she lay gasping for breath. The Defendant was holding the victim and telling her to wake up. She was not responding, and was "gargling." Thomas testified that the Defendant did not want her to suffer anymore, so he "[c]hoked her the rest of the way out."

Thomas attempted to help the Defendant by buying him some canned goods and night vision goggles and dropping him off in the woods. On another occasion, a man named Robert Williams picked Thomas up at work and told him that he needed to go with Williams to the Defendant's house. Williams and Thomas went into the trailer and retrieved a bag full of money and clothes. Thomas stated that Williams got the money by pawning a tractor, and Thomas believed there was a couple hundred dollars in the bag. Thomas was told by Williams not to say anything to anyone and to take the bag back to work with him. After work, Thomas was to take the bag to the Defendant in the woods, but the Defendant was not there, however, Thomas eventually was able to locate him.

Thomas stated that in the past he had told Agent Krofssik things that were not true, but he said that this was not because he did not know what happened. Thomas agreed that he waited more than two years to come forward with his information. He stated that he finally came forward because the victim's family kept asking when she was going to come back, and they were in great distress. He also felt that the Defendant was very remorseful and that had some impact on Thomas's desire to come forward.

On cross-examination Thomas admitted that he had been a methamphetamine user at different points in his life. He stated that he relapsed into drug use after learning that his father had

killed Mary Thomas. His drug use made him paranoid and brought on hallucinations. Thomas denied that Williams ever showed him the barrel or the corpse inside the barrel, however, he admitted that he had made a statement to Agent Krofssik that such an occurrence did take place. Thomas claimed that he had lied to Agent Krofssik but had only done so to protect the Defendant. On re-direct examination, Thomas testified that when the Defendant told him about the murder, Thomas had been off of drugs for three years.

Richard Farley, the victim's son, testified that he had a DNA test administered to him in order to facilitate identification of the victim's body. He had not seen the victim in eight or nine years prior to her disappearance.

Mary Michelle Beech testified that she is the victim's daughter and gave a DNA sample to be used to help positively identify the victim's body. She had not seen the victim in ten or eleven years.

Camilla Denise Leverette testified as an expert witness that she works at Orchid Cellmark in Nashville, which is a DNA testing laboratory. She took DNA samples from a femur and two molars taken from the body in the barrel discovered on the Defendant's property and compared the DNA patterns with those taken from Richard Farley and Mary Michelle Beech. This was done to determine if the body in the barrel was that of Mary Thomas. There was a 98.7% probability that the body in the barrel was Richard Farley's mother, and a 99.6% probability that the body in the barrel was Mary Michelle Beech's mother. Leverette stated that those were "very good numbers." Leverette also testified that when the two numbers were looked at in conjunction, they were an even stronger indicator of maternity.

Doctor Amy McMaster, who works for the Medical Examiner's Office in Nashville, testified that on September 13, 2002, she performed an autopsy on the body of Mary Thomas. The autopsy report included the following:

The decomposed intact remains of a white female and recovered from within the barrel. The decedent is dressed in a black leather jacket, heavy sweater, pants (possibly denim jeans), socks, panties, bra, and white leather athletic shoes. A piece of duct tape was found on the front of the sweater.

Evidence of injury includes fractures of the right and left horns of the thyroid cartilage and fractures of the hyoid bone. These fractures are indicative of strangulation with compression of both sides of the neck.

The advanced decomposition precludes determination of additional injuries on the skin and neck muscles.

In summary, the cause of death is strangulation. The manner of death is homicide.

The victim's body was in advanced putrefactive decomposition with diphtheria and the hands were partially mummified, which would be consistent with a body that had been in a barrel for more than two years. The body weighed one hundred and four and one half pounds. Dr. McMaster opined that the weight of the corpse was probably the same as the weight of the body prior to death, and that in some phases of decomposition, a body "may gain a little bit of water weight or weight due to insect activity or it may lose weight due to . . . dehydration." It was Dr. McMaster's opinion that although it was possible to strangle someone without leaving marks on the neck or breaking bones, the injuries suffered by the victim in this case were affirmative indicia of strangulation. Furthermore, the possibility that the victim suffered her injuries by being hit in the neck, open-handed, were "minimal . . . less than one percent." When questioned about whether a boxer is likely to suffer from these types of injuries, the doctor said that she would not expect to see such injuries as the result of a boxing match.

Dr. McMaster next testified about the subtleties of strangulation. She stated that when someone is strangled, they die because blood cannot flow to and from their brain and that strangulation does not kill a person by keeping them from breathing. She testified that the time it would take to kill someone in this fashion is highly variable, depending on how hard the victim was struggling, but in general she estimated it would take ten to fifteen seconds to bring someone to a state of unconsciousness. However, she said that if the pressure applied to the neck was released once the victim fell unconscious, no permanent damage would be suffered, and the victim would likely regain consciousness in time. To kill the victim would require the attacker to keep the pressure applied to the neck for an additional thirty to sixty seconds, although, again, these numbers may vary from case to case. Dr. McMaster said she did not believe there was any possibility that the victim's body in this case sustained the injuries associated with strangulation when she was placed in the barrel.

On cross-examination, Dr. McMaster testified that she was not given any information from the TBI regarding how the victim may have been killed. She stated that it was not possible to tell if the victim was strangled manually with someone's hands or with a ligature, such as a length of cord. An x-ray revealed that, aside from the fractures in the neck, there were no other broken bones in the body. Dr. McMaster stated that although age can have some impact on the amount of force necessary to break bone, in this case, the victim's age was not relevant. The doctor was not familiar with any cases where the hyoid bone was broken from something other than strangulation. Additionally, the doctor was not familiar with any cases where the thyroid cartilage or hyoid bone were broken during the autopsy. Dr. McMaster conceded that it was possible to break the hyoid bone with a blow from below, but that a blow from below could not break the thyroid cartilage. She also indicated that it was possible to break the hyoid bone in a high-speed auto accident, but the thyroid cartilage would not be broken in such a case. When questioned further on this subject the doctor stated that, although "anything is possible," it was not consistent with her knowledge on the subject and it was not probable.

Dr. McMaster agreed that it was possible that alcohol may have some impact on the time it would take a person to become unconscious or die from strangulation and that it was possible that alcohol could hasten the process.

The trial court then read to the doctor some questions from the jury. In response to these questions, Dr. McMaster testified that she believed that a very forceful blow to the neck with a closed fist or with an instrument could cause spasms, but not the type of injuries that the victim in this case sustained. She next stated that, although it was possible to have some bleeding from the mouth based upon a blow to the neck, she would not expect there to be much blood from such a blow and that bleeding from the mouth is more likely to be caused by a blow to the mouth. However, she admitted that it was conceivable that a blow to the neck could cause the teeth to clamp down on the tongue, which could produce bleeding. She stated that it was possible for thyroid cartilage to decay to the point where damage could not be detected, but in this case that had not happened.

Jerry Norton, the Defendant's cousin, testified that the Defendant and the victim were at Norton's house the evening of the murder for approximately two to three hours. The Defendant and victim both came and left together. The victim was in "good spirits . . . laughing [and] having a good time." The Defendant drank four or five beers and was slightly intoxicated, but not drunk. The victim had more to drink than the Defendant and was drinking liquor as well. She was "fairly well intoxicated."

On cross-examination, Norton testified that the victim was not a "mean" drunk, that she was always a pleasant person to be around, and that she always treated the Defendant well. The night before the murder, the victim and the Defendant were over at Norton's house because they were celebrating that they had reconciled. On Friday, January 21, 2000, the Defendant returned to Norton's around 11:00 a.m. and asked Norton to cut some lumber for him, so he could build some kitchen cabinets for the victim. The Defendant acted normal and did not ask for help hiding a barrel or for use of Norton's boat. Norton had never seen the Defendant mistreat the victim. Based on this evidence, the jury found the Defendant guilty of first degree premeditated murder.

II. Analysis

On appeal, the Defendant asserts that: (1) the evidence was insufficient to establish premeditation; (2) the trial court improperly overruled the Defendant's motion to suppress the victim's gold rings and the barrel containing her body; (3) the trial court erred when it denied the Defendant's motion for a continuance and change of venue based on pre-trial publicity; (4) the trial court erred when it admitted into evidence a photograph of the victim prior to her death and a photograph of the barrel that contained the victim's body; (5) the trial court erred when it denied the Defendant's request for a new trial based upon comments made by the State during closing arguments; (6) the trial court erred when it refused to allow the Defendant to move into evidence a statement from the bill of particulars; and (7) the trial court erred when it refused the Defendant's

request for a mistrial based upon certain members of the jury pool discussing the case prior to voir dire.

A. Sufficiency of the Evidence to Establish Premeditation

The Defendant's first assertion is that the evidence presented at trial was insufficient to establish premeditation, and thus, insufficient to convict him of first degree murder. When an accused challenges the sufficiency of the evidence, an appellate court's standard of review is whether, after considering the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Tenn. R. App. P. 13(e); Jackson v. Virginia, 443 U.S. 307, 324 (1979); State v. Duncan, 698 S.W.2d 63, 67 (Tenn. 1985). This rule applies to findings of guilt based upon direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. State v. Pendergrass, 13 S.W.3d 389, 392-93 (Tenn. Crim. App. 1999).

In determining the sufficiency of the evidence, this Court should not re-weigh or re-evaluate the evidence. State v. Matthews, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). Nor may this Court substitute its inferences for those drawn by the trier of fact from the evidence. State v. Buggs, 995 S.W.2d 102, 105 (Tenn. 1999); Liakas v. State, 286 S.W.2d 856, 859 (Tenn. 1956). Questions concerning the credibility of the witnesses, the weight and value of the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact. Liakas, 286 S.W.2d at 859. This Court must afford the State of Tennessee the strongest legitimate view of the evidence contained in the record, as well as all reasonable inferences which may be drawn from the evidence. State v. Evans, 838 S.W.2d 185, 191 (Tenn. 1992). Because a verdict of guilt against a defendant removes the presumption of innocence and raises a presumption of guilt, the convicted criminal defendant bears the burden of showing that the evidence was legally insufficient to sustain a guilty verdict. Id.

The offense of first degree murder includes a "premeditated and intentional killing of another." Tenn. Code Ann. § 39-13-202(a)(1) (2003). A premeditated act is "an act done after the exercise of reflection and judgment" and means that "the intent to kill must have been formed prior to the act itself." Id. at § 39-13-202(d). An intentional act refers to "the nature of the conduct or to a result of the conduct when it is [a] person's conscious objective or desire to engage in the conduct or cause the result[.]" Tenn. Code Ann. § 39-11-106(a)(18) (2003).

The element of premeditation is a question of fact to be resolved by the jury and may be established by proof of the circumstances surrounding the killing. State v. Suttles, 30 S.W.3d 252, 260 (Tenn. 2000). Because the trier of fact cannot speculate as to what was in the defendant's mind, the existence of facts of premeditation must be determined from the defendant's conduct in light of the surrounding circumstances. Although there is no strict standard governing what constitutes proof of premeditation, our Supreme Court has held that premeditation may be inferred from a defendant's use of a deadly weapon upon an unarmed victim; the cruelty of the killing; declarations by a defendant of an intent to kill; the defendant's procurement of a weapon; a defendant's preparations

prior to a killing for concealment of the crime; and calmness immediately after the killing. State v. Pike, 978 S.W.2d 904, 914 (Tenn. 1998); State v. Bland, 958 S.W.2d 651, 660 (Tenn. 1997).

The Defendant's sufficiency argument in this case focuses upon the lack of proof of any premeditation. There was evidence presented, however, to support a finding of premeditation. First, Vickie Holliman testified that, around one week prior to the murder, the Defendant had pointed a gun at the victim and threatened to kill her if she went to visit Tommy Manier. Manier testified that the Defendant came to his home, about two weeks prior to the murder, looking for the victim and told Manier to tell the victim that she had one hour to get home or he would take "another course of action," and she would know what the Defendant was talking about. The evidence presented at trial showed that the victim was moving back in with Manier. The jury could have inferred that the murder was the result of the Defendant following through on his threats, thus establishing legally sufficient grounds for premeditation through declarations by the Defendant of an intent to kill. See id.

Second, the Defendant's son, Anthony Thomas, testified that the Defendant said "[I] wasn't going to let her suffer no more," in response to seeing the victim writhing on the floor, gasping for breath. Thomas then stated that the Defendant told him that the "[c]hoked her the rest of the way out." Regardless of the Defendant's assertions, the jury could have based their verdict on Thomas's testimony, which clearly showed the Defendant acting after an "exercise of reflection and judgment." See Tenn. Code Ann. § 39-13-202(d).

Third, the Defendant's written confession states that he put the victim's body in a barrel, asked for help from a friend, and hid the barrel behind his house. Roger Fisher corroborated the Defendant's own written statements by saying that the Defendant had asked him for help and wanted Fisher to procure a boat so that the two of them could hide the victim's body in Cane Hollow at Center Hill Lake. This was sufficient to establish concealment of the crime, and, thus, premeditation. See State v. Pike, 978 S.W.2d 904, 914 (Tenn. 1998); State v. Bland, 958 S.W.2d 651, 660 (Tenn. 1997).

Accordingly, we conclude that the evidence is legally sufficient to support the jury's verdict of guilt for first degree murder.

B. Failure to Suppress Physical Evidence

The Defendant's second contention is that the trial court improperly overruled the Defendant's motion to suppress the victim's gold rings and the barrel containing the victim's body because they were obtained as the result of an unlawful search and seizure. When reviewing a trial court's findings of fact and conclusions of law on a motion to suppress evidence, we are guided by the standard of review set forth in State v. Odom, 928 S.W.2d 18 (Tenn. 1996). Under this standard, "a trial court's findings of fact in a suppression hearing will be upheld unless the evidence preponderates otherwise." Id. at 23. When the trial court, however, does not set forth its findings of fact upon the record of the proceedings, this court determines where the preponderance of the

evidence lies. Fields v. State, 40 S.W.3d 450, 457 n. 5 (Tenn. 2001); see also Ganzevoort v. Russell, 949 S.W.2d 293, 296 (Tenn. 1997). As in all cases on appeal, “[t]he prevailing party in the trial court is afforded the ‘strongest legitimate view of the evidence and all reasonable and legitimate inferences that may be drawn from that evidence.’” See State v. Carter, 16 S.W.3d 762, 765 (Tenn. 2000) (quoting State v. Keith, 978 S.W.2d 861, 864 (Tenn. 1998)). Furthermore, we review the trial court’s conclusions of law under a de novo standard without according any presumption of correctness to those conclusions. See, e.g., State v. Walton, 41 S.W.3d 75, 81 (Tenn. 2001); State v. Crutcher, 989 S.W.2d 295, 299 (Tenn. 1999).

The Fourth Amendment to the United States Constitution provides:

Unreasonable searches and seizures.--The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

U.S. Const. amend. IV. Similarly, article 1, section 7 of the Tennessee Constitution guarantees that:

[t]he people shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures; and that general warrants, whereby an officer may be commanded to search suspected places, without evidence of the fact committed, or to seize any person or persons not named, whose offences are not particularly described and supported by evidence, are dangerous to liberty and ought not to be granted.

Tenn. Const. art. 1, § 7. The intent and purpose of the prohibition against unreasonable searches and seizures found in the Tennessee Constitution has been held to be the same as found in the Fourth Amendment to the United States Constitution. See State v. Simpson, 968 S.W.2d 776, 779 (Tenn. 1998). Under both the United States and the Tennessee Constitutions, a search or seizure conducted without a warrant is presumed unreasonable. See Coolidge v. New Hampshire, 403 U.S. 443, 454-55 (1971); State v. Watkins, 827 S.W.2d 293, 295 (Tenn. 1992). Therefore, evidence seized as a result of a search or seizure conducted without a warrant must be suppressed unless that search or seizure was conducted pursuant to one of the recognized exceptions to the warrant requirement. See Watkins, 827 S.W.2d at 295.

1. The Victim’s Rings

A hearing was held on December 22, 2003, regarding the Defendant’s motion to suppress the victim’s rings. On February 12, 2004, the trial court issued a ruling on the Defendant’s motion, which set forth the following factual findings:

On [January 23, 2000], Agent Bob Krof[ssik with the Tennessee Bureau of Investigation presented a search warrant and supporting affidavit to Judicial Commissioner, Delores Talkington, for the search of [the] residence of the [D]efendant in conjunction with an on-going investigation of the disappearance of the [D]efendant's wife. The court specifically finds that adequate probable cause was shown to support said search warrant and that all procedural and technical requirements of issuance and execution thereof were met. [Later that morning], Agent Bob Krof[ssik went to the [D]efendant's residence and requested and received consent from the [D]efendant to search his property. Although Agent Krof[ssik had the search warrant on his person, the [D]efendant was not told nor was [the Defendant] aware of its existence at the time he gave Agent Krof[ssik permission to search. The court finds Agent Krof[ssik's testimony to be credible, reasonable and uncontradicted, and specifically finds that the [D]efendant's written consent to search his property on this date [] was given voluntarily, unequivocally, specifically, and intelligently without any duress or coercion whatsoever. The agent testified the [D]efendant has (2) years of college, responded appropriately at all times, and was not under the influence of drugs or alcohol. His consent specifically included permission to search not only the premises, but also "my person without a search warrant." Wherefore, the proof shows and the court finds that all the evidence seized on this date is admissible as evidence in this case.

The evidence does not preponderate against the findings of the trial court. Not only did Agent Krofssik have a search warrant that was based on probable cause, but the Defendant signed a form giving his consent to search his property and his person.

It is well settled that a search conducted pursuant to voluntary consent is an exception to the requirement that searches and seizures be conducted pursuant to a warrant. State v. Bartram, 925 S.W.2d 227, 230 (Tenn.1996). That is, although the Fourth Amendment and Article I, section 7 of the Tennessee Constitution condemn unreasonable searches and seizures, they recognize the validity of voluntary cooperation. Florida v. Bostick, 501 U.S. 429, 439 (1991); Schneckloth v. Bustamonte, 412 U.S. 218, 243 (1973) (holding "there is nothing constitutionally suspect in a person[] voluntarily allowing a search"); State v. Cox, 171 S.W.3d 174, 184 (Tenn. 2005). The sufficiency and validity of consent depend largely upon the facts and circumstances presented by each particular case. State v. Jackson, 889 S.W.2d 219, 221 (Tenn. Crim. App. 1993). "The existence of consent and whether it was voluntarily given are questions of fact" involving an examination of the totality of the circumstances in each case. State v. Ashworth, 3 S.W.3d 25, 29 (Tenn. Crim. App. 1999); see State v. McCrary, 45 S.W.3d 36, 43 (Tenn. Crim. App. 2000).

Additionally, the transaction between the Defendant and Agent Krofssik that resulted in the production of the rings cannot be categorized as a search within the meaning of the Fourth Amendment of the United States Constitution and article 1, section 7 of the Tennessee Constitution. The Defendant had been informed of his rights and volunteered the information regarding the victim's rings. Agent Krofssik simply asked if the Defendant knew where the rings were and the

Defendant responded by reaching into his pocket and handing them to the agent. Under the totality of the circumstances it is apparent that the Defendant's consent to search was freely given and thus, he is not entitled to relief on this issue.

2. The Barrel Containing the Victim's Body

The Defendant also asserts that the barrel containing the victim's body and the victim's body itself should be excluded, because they were the fruits of questioning in violation of his Sixth Amendment right to counsel. The Sixth Amendment to the United States Constitution guarantees that, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." U.S. Const. amend. VI. A defendant has the right to counsel at all "'critical' stages in the criminal justice process 'where the results might well settle the accused's fate and reduce the trial itself to a mere formality.'" Maine v. Moulton, 474 U.S. 159, 170 (1985) (quoting United States v. Wade, 388 U.S. 218, 224 (1967)).

The United States Supreme Court has long held that "the [Sixth Amendment] right to counsel attaches only at or after the initiation of adversary proceedings against the defendant. . . . '[W]hether by way of formal charge, preliminary hearing, indictment, information, or arraignment.'" United States v. Gouveia, 467 U.S. 180, 187-88 (1984) (quoting Kirby v. Illinois, 406 U.S. 682, 688-89 (1972)). This interpretation achieves the underlying purposes of the Sixth Amendment:

That interpretation of the Sixth Amendment right to counsel is consistent not only with the literal language of the Amendment, which requires the existence of both a "criminal [prosecution]" and an "accused," but also with the purposes which we have recognized that the right to counsel serves. . . . The "core purpose" of the counsel guarantee is to assure aid at trial, "when the accused [is] confronted with both the intricacies of the law and the advocacy of the public prosecutor."

United States v. Ash, 413 U.S. 300, 309 (1973). Indeed the right to counsel "embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel." Johnson v. Zerbst, 304 U.S. 458, 462-463 (1938).

Although we have extended an accused's right to counsel to certain "critical" pretrial proceedings, United States v. Wade, 388 U.S. 218 (1967), we have done so recognizing that at those proceedings, "the accused [is] confronted, just as at trial, by the procedural system, or by his expert adversary, or by both," Ash, 413 U.S. at 310, in a situation where the results of the confrontation "might well settle the accused's fate and reduce the trial itself to a mere formality." Wade, 388 U.S. at 224.

In Tennessee, an arrest warrant, or a preliminary hearing if no arrest warrant is issued, or an indictment or presentment, when the charge is initiated by the grand jury, marks the initiation of

criminal charges to which the Sixth Amendment right to counsel attaches. State v. Mitchell, 593 S.W.2d 280, 286 (Tenn. 1980).

Article I, section 9 of the Tennessee Constitution provides that “in all criminal prosecutions, the accused . . . shall not be compelled to give evidence against himself.” Tenn. Const. art. I, § 9. “Encompassed within these constitutional provisions is the right to counsel, which is applicable whenever a suspect requests that counsel be present during police-initiated custodial interrogation.” State v. Saylor, 117 S.W.3d 239, 244 (Tenn. 2003). When there is an unequivocal request for an attorney, all interrogation must cease, unless the suspect himself initiates further conversation with the police. Edwards v. Arizona, 451 U.S. 477, 484-85 (1981); State v. Stephenson, 878 S.W.2d 530, 545 (Tenn.1994).

As indicated above, the trial court’s factual findings on a suppression issue are binding upon this court unless the evidence in the record preponderates against them. Odom, 928 S.W.2d at 23. The prevailing party enjoys the strongest legitimate view of the evidence and all reasonable and legitimate inferences that may be drawn therefrom. Id. Review of the trial court’s application of law to the facts, however, is de novo. Walton, 41 S.W.3d at 81.

At the preliminary hearing, the trial court found that the testimony of Agent Bob Krofssik, Deputy Hill Harris, and Judge Leon Burns was credible, reasonable, and uncontradicted. A warrant for the Defendant’s arrest was issued on September 11, 2002, based on new, incriminating testimony from three new witnesses. On September, 12, 2002, Putnam County Sheriff’s Deputy Bill Harris executed the warrant at 9:16 a.m. at the Defendant’s residence.

“[Deputy Harris] placed [the Defendant] under arrest and put him in custody and placed him in the back seat of his [] patrol car. And at that time he read [the Defendant] his Miranda Rights. He went over [the Defendant’s] Miranda Rights with him, specifically telling us here in court what he stated to the [D]efendant, his right to remain silent, his right to an attorney and that he specifically asked the [D]efendant if he understood those rights and the [D]efendant confirmed that he did understand those rights.

Deputy Harris estimated that it took about ten minutes to get from the Defendant’s residence to the Sheriff’s Department and that, upon arrival, he took the Defendant to an interview room where Agent Krofssik was waiting. The Defendant did not ask for an attorney and did not appear to be suffering from any type of disability. Shortly after arriving at the Sheriff’s Department, the Defendant confessed to the crime and signed a form, consenting to have his property searched. The Defendant then agreed to show law enforcement officers the exact location of his deceased wife’s body. Subsequently, Agent Krofssik went over the consent form line by line with the Defendant. Agent Krofssik stated that the Defendant had two years of college, acted and responded appropriately, did not appear to be under the influence of drugs or alcohol, and seemed to want to get this off his “shoulders.” Agent Krofssik was of the opinion that the Defendant seemed relieved and wanted to tell the officers his side of the story, which he did.

After hearing the Defendant's story, Agent Krofssik obtained a search warrant from Judge Burns, and returned to the Sheriff's Department to pick up the Defendant because the Defendant had volunteered to take Agent Krofssik to the location of his deceased wife's body. Upon arriving at the Defendant's residence, the Defendant promptly led Agent Krofssik to the barrel that contained his wife's body.

Based upon this testimony the trial court concluded:

This court finds that the [D]efendant received the required Miranda warnings as given to him by Deputy Harris of the Putnam County Sheriff's Department prior to his arrest and that the [D]efendant confirmed to Officer Harris that he understood those rights.

The court further finds that Agent Krofssik did not re-advise the [D]efendant of these rights, but within ten, fifteen, twenty minutes outside from the time that he was given his rights and confirmed to Deputy Harris that he understood them, that he was interviewed and voluntarily interviewed by Agent Krofssik at the sheriff's office and did not request an attorney, even though this man had two years of college and even though he had been through this twice, on two prior occasions with Agent Krofssik, been interviewed, waived his rights and had been told of his rights.

And the situation, the totality of the circumstances here where the agent testified that he seemed to be relieved to get this off his chest, to get [t]his off his shoulders, that he [] agreed, he wanted to go show them where the body was located.

The trial court then ruled that the Defendant's statements to Agent Krofssik upon arrival at the Sheriff's Department, and the barrel containing the victim's body, as well as the body itself, were all admissible as evidence at trial.

When viewing the evidence in the light most favorable to the State, we conclude that the evidence does not preponderate against the findings of the trial court. There is nothing whatsoever in the record to suggest that the Defendant's waiver of his right to counsel was anything but knowing, intelligent, and voluntary. The Defendant presented no evidence at the motion hearing, and the evidence presented by the State was clear and cogent in showing that the Defendant was aware of his right to remain silent, his right to an attorney, and the fact that any statements made by him at that time could be used by the State against him in any future legal proceedings. In accordance, the Defendant is not entitled to relief on this issue.

C. Pre-trial Publicity

The Defendant's next contention is that the trial court abused its discretion when it denied his motion to continue the case because of pre-trial publicity. The State counters that all of the potential jurors who had been exposed to media coverage of the matter had either been excused or

had directly stated that they had not yet formed an opinion about the case and could be impartial in determining whether or not the Defendant had committed the crime for which he was being tried.

Tennessee Code Annotated section 40-14-108 (2003), states that, “A continuance because of too great excitement to the prejudice of the defendant shall be in the sound discretion of the court.” This Court has previously added that disposition of a motion for continuance rests in the sound discretion of the trial court and will not be disturbed absent a clear showing of abuse of discretion. State v. Butler, 795 S.W.2d 680, 684 (Tenn. Crim. App. 1990). The party asserting error in the denial of a motion for continuance has the burden of showing prejudice from the denial. Baxter v. State, 503 S.W.2d 226, 230 (Tenn. Crim. App. 1973). Reversal is not warranted unless an appellate court is convinced that the defendant did not have a fair trial and that a different result might reasonably have been reached if a continuance had been granted. Butler, 795 S.W.2d at 684.

In the case under submission, upon learning that some of the potential jurors had read a newspaper article about the case, the judge admonished them that it was absolutely essential that everyone involved get a fair trial. The judge then asked each juror who had read the article a series of questions regarding their ability to remain impartial if they were chosen to serve on the jury in the Defendant’s trial. One of the questions the judge asked of each individual juror in some form was whether the juror would be able to ignore preconceived notions about the case, set aside what they had read, and have an objective, open mind about the case. During voir dire there was some discussion regarding whether thirteen or fourteen of the potential jurors had discussed the case while waiting for jury selection to begin, however, upon questioning by the trial judge, out of the presence of the remaining potential jurors, it was apparent that the discussion involved a different murder case where a woman had shot and killed a man. Accordingly, these jurors were allowed to remain in the jury pool.

It is apparent from the transcript that the trial court did not abuse its discretion when it denied the Defendant’s motion for a continuance based on the jury’s exposure to the media’s coverage of the case. The burden is on the Defendant to make a clear showing that the trial court abused its discretion and that the Defendant did not have a fair trial and a different result might reasonably have been reached if a continuance had been granted. Butler, 795 S.W.2d at 684. The jurors were informed of the critical nature of maintaining an objective mind about the case, and the trial court was convinced that the jurors were veracious in their attesting to do so. This determination was within the trial court’s discretion. We cannot say that the Defendant has met his burden of proof, therefore, the Defendant is not entitled to relief on this issue.

D. Photographic Evidence

The Defendant next posits that the trial court erred when it allowed into evidence two pictures that the Defendant asserts were not relevant. The State argues that admission of the photographs was well within the discretion of the trial court because the photos were not prejudicial and they were relevant.

The Tennessee Supreme Court has determined that the admissibility of photographs is a matter within the discretion of the trial court, and the trial court's ruling concerning the admission into evidence of photographs "will not be overturned on appeal except upon a clear showing of abuse of discretion." State v. Banks, 564 S.W.2d 947, 949 (Tenn. 1978). "To be admissible, photographs must be relevant to some issue at trial and their probative value must outweigh their own prejudicial effect, if any." State v. Gann, 733 S.W.2d 113, 115 (Tenn. Crim. App. 1987).

The Tennessee Rules of Evidence state that all relevant evidence is generally admissible. Tenn. R. Evid. 402. Relevant evidence is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would have been without the evidence." Tenn. R. Evid. 401. However, "although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Tenn. R. Evid. 403.

We begin our analysis by noting that the Defendant failed to raise this issue at trial and therefore risked waiving the issue. However, in the interest of justice we shall address the issue on its merits.

The first picture at issue depicted the victim with Tommy Manier. The trial court admitted the photo into evidence without objection. Although the Defendant claims that the photograph was used to elicit emotions of "bias, sympathy, hatred, contempt, retribution," and to "influence the passion of the jury," we find the photograph was relevant to show that the victim had been in good health and to show the size and physique of the victim, and thus, the trial court did not abuse its discretion.

With regard to the photograph of the barrel containing the victim's body, the photograph was relevant to show the condition of the barrel upon arrival at the Medical Examiner's Office. Several photographs of the barrel, in the woods, being loaded into the back of a van, and finally at the Medical Examiner's Office, were entered into evidence. The Defendant did not object to the other photos of the barrel, however, he contends that the photo of the medical examiner reaching into the barrel was used to elicit emotions of "bias, sympathy, hatred, contempt, retribution, or horror." In support of this claim, the Defendant cites to several cases where photographs of a victim's body had been entered into evidence, however, in this case the victim's body was never shown. We believe that the trial court was within its discretion when it allowed the photograph into evidence, and that the probative value of proving the condition of the barrel upon arrival at the Medical Examiner's Office outweighs any possible prejudicial effect the photograph. Accordingly, the Defendant is not entitled to relief on this issue.

E. Improper Closing Arguments

The Defendant next asserts that the trial court erred when it denied the Defendant's request for a new trial based on allegedly improper closing arguments by the State. The State demurs,

arguing that the closing arguments made by the State were not improper and further asserts that, even if they were improper, the Defendant did not suffer any prejudice from the disputed arguments.

The Tennessee Supreme Court “has long recognized that closing arguments are a valuable privilege that should not be unduly restricted.” Terry v. State, 46 S.W.3d 147, 156 (Tenn. 2001) (citing State v. Sutton, 562 S.W.2d 820, 823 (Tenn. 1978)); State v. Goltz, 111 S.W.3d 1, 5 (Tenn. Crim. App. 2003). “Consequently, attorneys are given greater leeway in arguing their positions before the jury, and the trial court has significant discretion in controlling these arguments, to be reversed only upon a showing of an abuse of that discretion.” Terry, 46 S.W.3d at 156 (citing Sutton, 562 S.W.2d at 823); see Smith v. State, 527 S.W.2d 737, 739 (Tenn. 1975); Goltz, 111 S.W.3d at 5. This Court has explained that “[closing] arguments must be temperate, based upon the evidence introduced at trial, relevant to the issues being tried, and not otherwise improper under the facts or law.” Goltz, 111 S.W.3d at 5 (citing Coker v. State, 911 S.W.2d 357, 368 (Tenn. Crim. App. 1995)).

When an appellate court finds an argument improper, “the established test for determining whether there is reversible error is whether the conduct was so improper or the argument so inflammatory that it affected the verdict to the Appellant’s detriment.” Goltz, 111 S.W.3d at 5 (citing Harrington v. State, 215 Tenn. 338, 385 S.W.2d 758, 759 (1965)). In measuring the prejudicial impact of an improper argument, this Court should consider the following factors: “(1) the facts and circumstances of the case; (2) any curative measures undertaken by the court and the prosecutor; (3) the intent of the prosecution; (4) the cumulative effect of the improper conduct and any other errors in the record; and (5) the relative strength or weakness of the case.” Goltz, 111 S.W.3d at 5-6 (citing Judge v. State, 539 S.W.2d 340, 344 (Tenn. Crim. App. 1976)); see State v. Buck, 670 S.W.2d 600, 609 (Tenn. 1984).

In Goltz, this Court found that within the closing argument, five general areas of prosecutorial misconduct are recognized:

1. It is unprofessional conduct for the prosecutor intentionally to misstate the evidence or mislead the jury as to the inferences it may draw.
2. It is unprofessional conduct for the prosecutor to express his [or her] personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant. See State v. Thornton, 10 S.W.3d 229, 235 (Tenn. Crim. App. 1999); Lackey v. State, 578 S.W.2d 101, 107 (Tenn. Crim. App. 1978); TENN. CODE OF PROF’L RESPONSIBILITY DR 7-106(c)(4).
3. The prosecutor should not use arguments calculated to inflame the passions or prejudices of the jury. See [State v.]Cauthern, 967 S.W.2d [726,] 737 (1998); State v. Stephenson, 878 S.W.2d 530, 541 (Tenn. 1994).
4. The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence, by injecting issues broader than the guilt or innocence of the accused under the controlling law, or by making predictions of the consequences of the jury’s verdict. See Cauthern, 967 S.W.2d at 737; State v.

Keen, 926 S.W.2d 727, 736 (Tenn. 1994).

5. It is unprofessional conduct for a prosecutor to intentionally refer to or argue facts outside the record unless the facts are matters of common public knowledge.

Goltz, 111 S.W.3d at 6 (quoting STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION §§ 5.8-5.9 Commentary (ABA Project on Standards for Criminal Justice, Approved Draft 1971)).

In the case under submission there are three specific comments that the Defendant states were improper. The first was an anecdote that A.D.A. Patterson shared with the jury regarding an incident from his childhood. A.D.A. Patterson relayed the following story:

When I was in junior high school, I was thirteen years old. I have a little brother who was . . . five years younger than me We played all the time. . . . We did this thing where I'd lay on my back and I'd put my knees up so that my feet were propped up and he sat on the bottoms of my feet and I shot him up in the air. . . . [W]e were playing as if he was Super[m]an and he was flying through the air this way. . . . And as we did it farther and farther as it got to be more and more fun, he would land on his feet. But the last time we did it, I shot him really a long ways and . . . [h]e landed on the ground and his hands hit first and what happened was both of the bones in this arm and both of the bones in the other arm . . . broke. They broke, snapped. You could see it.

And I looked and I said oh, my God. I'm thirteen years old, he's eight. I love him, he's my brother. I picked him up just like this and I carried him into the house. And I'm crying and I took him to my parents and I said look what I did to Johnny.

The Defendant objected to A.D.A. Patterson's story, and the objection was sustained, however, no curative instruction was requested, and, thus, no curative instruction was given. The Defendant contends that this was tantamount to arguing facts outside of the record to help the jury make an inference that the Defendant acted with premeditation.

After reviewing the record it is apparent that A.D.A. Patterson was never afforded the opportunity to elucidate the inference he wished the jury to draw from his story. Assuming that the General wished the jury to come to the conclusion that when someone accidentally causes an injury they are more likely to be forthcoming and take responsibility for their actions than if they have intentionally caused an injury, we conclude that the Defendant suffered no prejudice from this argument. According to the Tennessee Supreme Court, in State v. Nichols, 24 S.W.3d 297, 302 (2002), concealment or destruction of evidence of a crime can be used as an inference to establish premeditation. Thus, although A.D.A. Patterson's story was not admissible as evidence, the General did not mislead the jury as to any inferences it could draw or misstate any evidence. In light of the strength of the State's case, we conclude that the Defendant suffered no prejudice due to A.D.A.

Patterson's statements. The record contains more than sufficient evidence from which the jury could have concluded that the Defendant acted with premeditation when he killed the victim. The Defendant made multiple declarations of his intent to kill, which is another factor that may be used to make an inference that the killing was premeditated. See id. The first was when he told the victim in Vickie Holliman's presence that he would kill her if he found out she had been at Tommy Manier's house. The second was when he told his son Anthony Thomas that he did not want the victim to suffer any more, so he "choked her the rest of the way out." In light of this evidence, the Defendant is not entitled to relief on this issue.

The Defendant next contends that the State improperly argued facts not in evidence during its rebuttal closing argument. Specifically, the Defendant objected to the following comments:

There's one other thing and there hasn't been much talk about it. Twenty inches of duct tape. It's got a lot of uses. You can fix almost anything with it.

. . . .

And in the case of a human body it has uses, too. It keeps people quiet. It keeps wrists bound together.

The Defendant promptly objected to these statements, however, the objection was overruled.

Initially, it should be noted that the State followed the comments in question with an admission that they could not prove what the duct tape was used for: "We can't prove where the duct tape was except the duct tape [was] stuck to the sweater of the decomposed body of Mary Thomas. Why it was there, I don't know." Again, great latitude is to be given to attorneys during closing arguments, and a trial court's decision is only to be overturned upon a finding of abuse of discretion. See Terry, 46 S.W.3d at 156. Although closing arguments must be based upon evidence introduced at trial, when viewing the facts in the light most favorable to the State, there can be no doubt that the State's comments regarding the duct tape found on the victim's body were predicated upon evidence introduced at trial. See Goltz, 111 S.W.3d at 5. At trial, Dr. McMaster read from a portion of the autopsy report she prepared which stated that when the barrel containing the victim's body was opened she observed a piece of duct tape on the front of the victim's sweater. Thus, during the State's rebuttal closing argument the State did not argue facts not introduced at trial, rather, the State pointed out a logical inference that the jury could make from the evidence that had already been introduced. Tennessee courts have long held that during closing arguments each party "may argue not only the facts in evidence, but also any reasonable inferences which may be drawn from such facts." State v. McCracken, No. W2001-03176-CCA-R3-CD, 2003 WL 1618082, at *8 (Tenn. Crim. App., at Jackson, March 24 2003), *perm. app. denied* (Tenn. Sept. 2, 2003) (citing Russell v. State, 532 S.W.2d 268, 271 (Tenn. 1976)). It was well within the trial court's discretion to allow the State to proffer this theory during its rebuttal closing argument, thus, the Defendant is not entitled to relief on this issue.

The Defendant's next assertion is that the State's comments regarding the duct tape found on the victim's sweater were outside of the subject matter covered in their closing argument. The State argues that, although the duct tape was never specifically alluded to during closing arguments, premeditation was discussed extensively and the comments about the duct tape made during rebuttal were made in relation to premeditation. Further, the State asserts that even if the comments were improper, the error was harmless because the Defendant cannot show that it affected the jury's verdict.

Tennessee Rule of Criminal Procedure 29.1(b) states that "[t]he State's opening argument shall cover the entire scope of the State's theory, and the State's closing argument shall be limited to the subject matter covered in the State's opening argument and the defendant's intervening argument."

In a similar, but distinguishable, case State v. Tidwell, No. M2000-2628-CCA-R3-CD, 2002 WL 31852861, at *15-16 (Tenn. Crim. App., at Nashville, Dec. 18 2002), *no Tenn. R. App. P. 11 application filed*, the State argued that its rebuttal closing argument was permissible because it argued facts that were related to a subject covered in its initial closing argument. In that case the State's challenged rebuttal argument was far more factually attenuated than in the instant case. In Tidwell, during the rebuttal argument, the State accused the Defendant of lying about hitting the victim in the chest with a bat, however, neither the State nor the defense made any mention of the Defendant lying about his assault on the victim prior to the State's rebuttal closing argument. See id. Rule 29.1(b) is clear that "[t]he State's opening argument shall cover the entire scope of the State's theory[.]" thus, no new argument is proper, even if it is related to a previously posited argument. See Tenn. R. Crim. P. 29.1(b); Tidwell, No. M2000-2628-CCA-R3-CD, 2002 WL 31852861, at *15-16.

In the case under submission, no new argument is being raised, the State simply brought forward a fact relevant to a topic discussed in great detail by both sides during their initial closing arguments. During the State's initial closing argument the State proffered the theory that Mary Thomas's murder was committed with premeditation. To support this theory the State enumerated the following pieces of evidence: (1) the Defendant told the victim he would kill her if she went back to Manier's; (2) Anthony Thomas's testimony and the physical evidence indicate that the Defendant made a conscious choice to strangle the victim; and (3) the Defendant hid the victim's body, asked friends for help in disposing of the body, and lied about the crime to the police for over two and a half years. Subsequently, the Defendant devoted a significant amount of time during his closing arguments attempting to establish that the crime was not committed with premeditation. During rebuttal closing argument the State again delved into the facts that support a finding of premeditation and added the additional fact that there was a strip of duct tape found on the victim's sweater. Tennessee Rule of Criminal Procedure 29.1(b), says the State's initial closing argument must cover the entire "scope" of the State's theory, it does not say that it must cover every factual allegation that may be used to support the State's theory. We interpret Tennessee Rule of Criminal Procedure 29.1(b) as precluding new topics from being broached but not as terminating the State's ability to augment the factual foundation laid during either sides' initial closing argument so long as those

facts have been properly established during the presentation of evidence. In the case at hand, no new subject was addressed during rebuttal closing argument; the State simply laid out an additional piece of the factual foundation that supported their previously argued theory of the case. Accordingly, the Defendant is not entitled to relief on this issue.

F. Excluded Statement from the Bill of Particulars

The Defendant's next assertion is that the trial court erred when it denied the Defendant the opportunity to introduce a statement from the bill of particulars that noted that, at the time, the State was not able to identify any weapon used to kill the victim. The State counters that information from the bill of particulars is not evidence and that the information the Defendant sought to introduce was readily available via cross examination of one of the State's witnesses.

The admission of evidence governed by the Tennessee Rules of Evidence rests within the broad discretion of the trial court and will not be disturbed absent an abuse of discretion. State v. Stinnett, 958 S.W.2d 329, 331 (Tenn. 1997). Use of a bill of particulars is established by Tennessee Rule of Criminal Procedure 7(c), which states that "[u]pon motion of the defendant the court may direct the filing of a bill of particulars so as to adequately identify the offense charged." The Advisory Commission's Comments further define the use of a bill of particulars by noting "[s]ubsection (c) provides for a bill of particulars where needed by the defendant in order that the defendant can know precisely what he or she is charged with. This provision is to be construed to serve that singular purpose, and is not meant to be used for purposes of broad discovery."

The Defendant claims that he was denied his constitutional right to present a defense when the trial court would not allow the Defendant to read a section from the bill of particulars to the jury. The Defendant wished to read a section of the bill of particulars that stated that the State could not "describe any weapon used to kill the victim." The Defendant cites to the Sixth Amendment and the Due Process clause of the Fourteenth Amendment of the United States Constitution to support his assertion. While it is uncontroverted that the United States Constitution preserves a criminally accused's right to present a defense, we conclude that the Defendant was not denied this right.

To begin with, it should be noted that the trial court acted within its discretion when it denied the Defendant's request to read to the jury from the bill of particulars and that the trial court's ruling was entirely in harmony with the legislature's intent regarding use of a bill of particulars. See Stinnett, 958 S.W.2d at 331; Tenn. R. Crim. P. 7(c) Advisory Comm'n Com. Additionally, the Defendant could have questioned Agent Krofssik or Dr. McMaster and easily obtained a statement from either of them admitting that the State could not prove that any weapon was used to kill the victim. Finally, the State did not present evidence as to what kind of weapon, if any, was used to kill the victim. The State's case relied on proving only that the victim was strangled to death. No manner of weapon or device was ever mentioned in connection with the victim's death. Dr. McMaster testified that, "I cannot tell whether it was a manual strangulation or a ligature strangulation." This is essentially the same statement as was made in the bill of particulars and

should have been more than adequate to support the Defendant's theory for his defense, therefore, the Defendant is not entitled to relief on this issue.

G. Request for a Mistrial Based on a Tainting of the Jury Pool

The Defendant's final contention is that the trial court erred when it refused to grant the Defendant's request for a mistrial during voir dire. The Defendant argues that the jury pool was tainted due to some comments made by a potential juror in the presence of several other jurors. The State argues that the comments made did not warrant a mistrial and that, because the jurors who heard the comment were not on the Defendant's jury, the trial court did not abuse its discretion.

The decision of whether to grant a mistrial is within the sound discretion of the trial court. State v. McKinney, 929 S.W.2d 404, 405 (Tenn. Crim. App. 1996). Normally, a mistrial should be declared only if there is a manifest necessity for such action. Arnold v. State, 563 S.W.2d 792, 794 (Tenn. Crim. App. 1977). A manifest necessity exists when "no feasible alternative to halting the proceedings" exists. State v. Knight, 616 S.W.2d 593, 596 (Tenn. Crim. App. 1981). The defendant bears the burden of establishing a manifest necessity. State v. Seay, 945 S.W.2d 755, 764 (Tenn. Crim. App. 1996). This Court will not disturb that decision unless there is an abuse of discretion. State v. Adkins, 786 S.W.2d 642, 644 (Tenn. 1990); State v. Williams, 929 S.W.2d 385, 388 (Tenn. Crim. App. 1996).

In the case at issue, a potential juror, Verble Vickers, made a few comments about the case in front of several potential jurors. The trial court separated Vickers from the remaining members of the jury pool and the following conversation took place:

The Court: Mr. Vickers, we've brought you out of the courtroom, we're here in a jury room away from the other jury members. . . .

We want to ask you about the statement you made in the courtroom about some discussion that was had with some potential jury members while you were back in the jury holding area.

Tell us about that conversation.

Mr. Vickers: Just what I said out there. I was down there [in Cane Hollow] when they c[a]me looking for the barrels. I was fishing and Sheriff Abston c[a]me down there and the TBI. They said there w[ere] two barrels supposed to be there and they w[ere] looking for them.

And all I got to say is if he d[id] what they said he d[id], they just need to take him right on and take care of him.

The Court: So you had a discussion with some of the jurors about this?

Mr. Vickers: Well, I wouldn't say a discussion. Just what I said out there, I was down there fishing when they c[a]me down there and they told me what they were looking for.

The Court: Who did you talk to about this, how many of the jurors heard this conversation?

Mr. Vickers: Just them two that said something out there. Just two or three or four.

The Court: This wasn't a general discussion with all the jurors?

Mr. Vickers: No, no.

The Court: You think it only involved one or two people?

Mr. Vickers: Yeah.

Vickers was subsequently dismissed from the jury pool, and the trial court asked for anyone who overheard his comments to identify themselves. Four potential jurors indicated that they had overheard Vickers's comments. The court and attorneys questioned the jurors regarding what they had heard and their ability to remain impartial. They indicated that Vickers had not given his personal opinion as to the Defendant's innocence or guilt and that Vickers did not go into any detail regarding the case, however, one of the potential jurors, Ms. Lee, indicated that she had heard Vickers say that someone had told Vickers that the Defendant was guilty. None of the four potential jurors who overheard Vickers's comments were selected to serve on the Defendant's jury.

After carefully reviewing the facts pertinent to this issue we conclude that there existed no manifest necessity to declare a mistrial. As noted above, a manifest necessity exists only when there is "no feasible alternative to halting the proceedings." Knight, 616 S.W.2d at 596. In the case before us, the jurors indicated that they would be capable of forming an unbiased opinion as to the Defendant's innocence or guilt. Additionally, none of the potential jurors who overheard Vickers's remarks were actually empaneled on the Defendant's jury. As such, there was no reason to interrupt the trial court's proceedings, and it was well within the trial court's discretion to deny the Defendant's request for a mistrial. The Defendant is not entitled to relief on this issue.

III. Conclusion

In accordance with the foregoing reasoning and authorities, we conclude that the trial court committed no reversible error. Therefore, the judgement of the trial court is affirmed.

ROBERT W. WEDEMEYER, JUDGE